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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, contrary to the holding of this Court in *Pierce v. Underwood*, 487 U.S. 552 (1988), a single lower court decision in its favor confers upon the government immunity under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA").

Whether the government's jurisdictional position was not "substantially justified" under EAJA where this Court unanimously held on the merits that it was "quite unnatural," "in clear contravention of Congress' intent," "wholly unpersuasive," and "unsupported by statutory language" (and where the contrary conclusion was "clear" from the "plain language" of the statute).

Whether contrary to the holding of the Seventh Circuit, the Second Circuit properly may adjudicate an EAJA claim while wholly ignoring this Court's unanimous decision on the merits.

PARTIES TO THE PROCEEDING

Petitioners are William C. Dunn ("Dunn") and Delta Consultants, Inc. ("Consultants"). Dunn is an individual; Consultants is a New Jersey corporation of which Dunn is the president.

Respondent is the Commodity Futures Trading Commission.

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that Delta Options, Ltd. and Nopkine Co., Ltd., which were named as defendants in the original action brought by the CFTC, were not parties to the proceeding in the court whose judgment is sought to be reviewed.

Pursuant to Rules 14.1(b) and 29.6 of the Rules of this Court, petitioner Consultants states that it has no parent companies or subsidiaries.

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COMMODITY FUTURES TRADING COMMISSION,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Dunn and Consultants petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a-5a, is reported at 169 F.3d 785. The order of the district court, App. 6a-11a, is unreported. The opinion of this Court, before remand, App. 12a-28a, is reported at 519 U.S. 465.[1]

[1] Federal jurisdiction in the district court was based on the question of the application of a federal statute. 28 U.S.C. § 1331.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1999. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2412(d)(1)(A) of the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"), provides in full as follows:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

STATEMENT

EAJA provides that "a court shall award to a prevailing party" its attorney fees and other expenses incurred, "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). Here, it is undisputed that Petitioners were the "prevailing part[ies]"—due to this Court's prior unanimous decision in their favor. However, particularly in the specific circumstances presented, the Court's decision also should have demonstrated to the court below that the government did not meet its burden of proof that its position was "substantially justified."

The Court's Prior Opinion, Before Remand

In the underlying action, the Commodity Futures Trading Commission ("CFTC") filed an enforcement action against Petitioners, who moved to dismiss on the basis that their *off*-exchange transactions in foreign currency options were excluded from the jurisdiction of the CFTC by the Treasury Amendment to the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* (the "CEA") (which exempts from CFTC jurisdiction all "transactions in foreign currency," unless they occur on an organized "board of trade" (or "exchange")). 7 U.S.C. § 2(ii). The district court denied that motion, and the court of appeals affirmed.

On February 25, 1997, the Court unanimously held that the opposite answer was "dictated" by the "plain meaning" of the Treasury Amendment—as Petitioners had consistently argued. The Court distinctly rejected the variety of CFTC contentions to the contrary, expressly stating, *inter alia*, that the CFTC's interpretation of the statute was "quite unnatural," "in clear contravention of Congress' intent," "wholly unpersuasive," and "unsupported by statutory language."[2] App. 18a-19a, 22a.

The Application Under EAJA

Thereafter, Petitioners timely filed their application for attorney fees and expenses pursuant to EAJA. The district court denied Petitioners' application by Order dated March 20, 1998. App. 6a-11a. Petitioners appeal from a March 26, 1999 Order of the Court of Appeals for the Second Circuit, affirming the district court—which was *contrary* to existing

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[2] Despite such a unanimous decision, the CFTC's Chairperson contended that "[t]here are other issues that are still open in the case and the case will go forward" (*Futures Industry*, March 1997, at 28)—thereby foreshadowing the CFTC's tactics on remand, when it persisted in its unwarranted attempts to continue the underlying litigation, by purporting to resurrect previously abandoned contentions. Ultimately, the Second Circuit rejected the CFTC's improper attempt to prolong this litigation, and directed that the district court dismiss the complaint.

EAJA precedent of the Court, and *ignored* all of the contents of the Court's prior opinion in the underlying action (and also was in conflict with the Seventh Circuit and its own precedent). App. 1a-5a.

Petitioners contended that, in the circumstances presented, the Court's analysis, language, and conclusions concerning the baselessness of the CFTC's position, belied any valid claim that it was "substantially justified." Additionally, such a decision should have bound the Second Circuit under both basic constitutional principles, as well as its own controlling EAJA determination in *Federal Election Comm'n v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994) ("*Political Contributions*"). However, the Second Circuit erroneously held, *solely* on the basis of a ten-year old decision by a prior panel in *Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986) ("*American Board of Trade*")—the rationale of which was wholly rejected in the Court's underlying decision—that the CFTC had been "substantially justified."[3]

However, contrary to the overly simplistic approach adopted by the court below—which completely ignored this Court's decision in the underlying action on the merits—the Second Circuit also failed to follow the Court's separate EAJA admonition in *Pierce v. Underwood*, 487 U.S. 552, 569 (1988) ("*Pierce*") that "[o]bviously, the fact that one other court agreed or disagreed with the Government does *not*

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[3] The Second Circuit correctly noted that when, as here, "a party has demonstrated that it is a prevailing party under the EAJA, the burden shifts to the government to demonstrate that its litigation position was 'substantially justified.' " App. 3a. However, in erroneously holding that the district court did not abuse its discretion in finding that the CFTC met its burden, the court below affirmed the finding based "on the fact that the Commission had relied on unambiguous Second Circuit precedent" (App. 3a-4a)—notwithstanding that the Court had unanimously rejected that decision's rationale as "quite unnatural."

establish whether its position was substantially justified," particularly since "the Government could take a position that is not substantially justified, yet win" (emphasis added)—as was the situation here, prior to the Court's decision in the underlying action.

REASONS FOR GRANTING THE PETITION

Congress enacted EAJA to address "[c]oncern[s] that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation." (*Pierce*, *supra*, 487 U.S. at 575-76, Brennan, J., concurring) Here, rather than the mere fact of the CFTC's loss, it was the Court's rationale in rejecting each of its "unnatural" arguments which demonstrates that its position was not "substantially justified." Where, as here, the government's loss is due to agency contentions which the Court unanimously found not only "quite unnatural," but also "wholly unpersuasive," "unsupported by statutory language," and "in clear contravention of Congress' intent"—and the contrary conclusion (espoused by Petitioners from the outset) was "plain" from the clear statutory language (App. 18a-19a, 22a)—the lower courts reviewing Petitioners' EAJA application should have been bound by such a determination.

Instead, the decision below effectively creates EAJA immunity for the government—as long as it can find one case to support its position. Not only does such a determination contradict the Court's prior holding concerning "substantial justification," it also resurrects a sovereign immunity which EAJA was enacted to restrict, and creates an intolerable legal result. Thus, where there is a single prior decision in its favor—notwithstanding that its purported rationale is wholly defective or in conflict with decisions of other courts—the government can proceed with impunity, without fear of an EAJA award.

In addition to improperly encouraging the government to forum shop, such a holding also places potential litigants in the improper position of challenging unjustified government action at their own cost—simply because the government has a single precedent upon which to rely. Thus, it improperly violates both the purpose and the statutory language of EAJA, by actually deterring challenges to such unwarranted governmental action: no matter how unjustified the government's position was, the existence of a single prior decision in its favor in a circuit, precludes an EAJA award in that circuit.

Here, the CFTC initiated this action without any substantial justification, in an ultimately unsuccessful attempt to expand its regulatory jurisdiction beyond the appropriate parameters clearly set out by Congress in the Treasury Amendment. As demonstrated by the Court's decision, the CFTC engaged in an unjustified jurisdictional gambit—as a result of which Petitioners were forced to incur hundreds of thousands of dollars in fees and expenses. Since the claims raised (and relief requested) in its complaint evidently were only of secondary concern to the CFTC—and its actual motivation was to improperly expand its jurisdiction—an EAJA award is particularly appropriate.

A. The Judgment of the Court of Appeals Below Conflicts With Two Separate Decisions of the Court

1. The Decision Below Conflicts With Existing EAJA Precedent of the Court

The decision below effectively conferred EAJA immunity on the CFTC, *solely* based on a single prior decision of that court—notwithstanding that its rationale was unanimously rejected by the Court. Such a decision constituted an abuse of discretion—since it was reached by *ignoring* the Court's underlying holding before remand, and *conflicts* with the Court's prior holding in *Pierce*.

There, in the Court's "first EAJA case," where it was "called upon to consider the phrase 'substantially justified' " (487 U.S. at 576, Brennan, J., concurring), it clearly held that "[o]bviously, the fact that one other court agreed or disagreed with the Government does *not* establish whether its position was substantially justified," particularly since "the Government could take a position that is not substantially justified, yet win" (487 U.S. at 569, emphasis added)—as was the situation here, prior to the Court's decision. However, notwithstanding this Court's holding in *Pierce*, the Second Circuit relied *solely* on its own prior decision in *American Board of Trade*—even though (and without even acknowledging that) its specific rationale was held by the Court to have been "quite unnatural." App. 18a.

Additionally, the court's holding permits the government to convert a position which was not substantially justified (although the government still won), into a position which is deemed to be substantially justified in later cases. In other words, notwithstanding the Court's acknowledgment in *Pierce* that "the Government could take a position that is not substantially justified, yet win" (487 U.S. at 569), that same position would necessarily be characterized as substantially justified under EAJA as to any later litigant. Thus, the decision below renders *Pierce*'s admonition meaningless, and gives the government no incentive to carefully consider its litigating position—which violates EAJA's intent to address this kind of unjustified governmental action, to "make Government bureaucrats think long and hard before they start an enforcement action," and to allow "prevailing private parties the chance to recover litigation expenses in actions against the Federal Government, where the Government cannot prove that its conduct is substantially justified." 131 Cong. Rec. 20,347, 20,348 (daily ed. July 25, 1985, statements of Senator Grassley on EAJA's reenactment).

Thus, not only did the decision below erroneously ignore all of the Court's holdings in its underlying decision before

remand, it also improperly rejected the Court's prior holding in *Pierce* that a decision in the government's favor in one prior case "obviously" is *not* sufficient to "establish whether its position was substantially justified." (487 U.S. at 569)[4] By blindly following its ruling in *American Board of Trade*—the rationale of which was unanimously rejected by the Court—the Second Circuit violated the Court's holdings in two separate opinions.

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[4] Additionally, it failed to even consider *any* of the other decisions rendered concerning the appropriate scope of the Treasury Amendment, which had been contested in a number of cases, including appellate decisions by the Second, Fourth, Seventh, and Ninth Circuits—where only the Second Circuit in *American Board of Trade* and *Dunn* had held (erroneously) that the CFTC had jurisdiction over *off*-exchange options. Chronologically, these decisions are as follows: (1) *Board of Trade of the City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982), which held only that organized *exchange* trading in GNMA options was within CFTC rather than SEC jurisdiction, but expressly drew "no conclusion as to whether the Treasury Amendment affects any CFTC jurisdiction over options on foreign currency" 677 F.2d at 1154 n.34; (2) *Abrams v. Oppenheimer Government Securities, Inc.*, 737 F.2d 582 (7th Cir. 1984), which held that the Treasury Amendment exempts *off*-exchange GNMA forward contracts from CFTC jurisdiction; (3) *American Board of Trade, supra*, which held that options did not become "transactions in foreign currency" until they were exercised, and thus the Treasury Amendment exemption did not cover options; (4) *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031, *reh'g denied*, 511 U.S. 1138 (1994), which held that *off*-exchange "transactions in foreign currency"—including options—were exempt from CFTC regulation by the Treasury Amendment; (5) *CFTC v. Dunn* (before the unanimous reversal by the Court) which had held it was bound by its prior decision in *American Board of Trade* (i.e. that options were not included in the Treasury Amendment exemption); and (6) *Commodity Futures Trading Comm'n v. Frankwell Bullion, Ltd.*, 99 F.3d 299 (9th Cir. 1996) ("*Frankwell*") (decided the week prior to oral argument before the Court in *Dunn*), which held that "Congress intended the Treasury Amendment to exempt all *off*-exchange transactions in foreign currency."

2. The Decision Below Ignores the Underlying Decision of the Court Before Remand

In its underlying decision, the Court reviewed the plain statutory language of the Treasury Amendment, its legislative history, and each of the arguments advanced by the CFTC. After its detailed analysis, the Court unanimously found that the issue (of whether "transactions in foreign currency" included "options") clearly was answered by simple and direct reference to the language of the Treasury Amendment. "We think it plain that foreign currency options are 'transactions in foreign currency' within the meaning of the statute," and "are not persuaded by any of the arguments advanced by the CFTC." App. 17a. Significantly, the Court was the only court to address the merits of Petitioners' contentions—as neither the district court nor the court below performed such an independent analysis, and instead held they were bound by the ten year old decision in *American Board of Trade*.

The decision below completely ignored that this Court's opinion essentially explained how its conclusion was the only appropriate result which could be reached, and rejected as legally unsound each of the CFTC's various contrary contentions—including the specific rationale relied on by the court below (both in its initial decision in the underlying case, as well as in its prior *American Board of Trade* decision), namely that options did not become "transactions in foreign currency" until they were exercised. As the Court held in its decision before remand:

> "[T]he Commission submits that the term 'transactions in foreign currency' includes only the 'actual exercise of an option (*i.e.*, the actual purchase or sale of foreign currency)' but not the purchase or sale of an option itself. Brief for CFTC 31. That reading of the text seems *quite unnatural* to us, and we decline to adopt it."

App. 18a (emphasis added)

Instead, as Petitioners had contended, the Court held that the purchase or sale of an off-exchange foreign currency option is itself a "transaction" (which provides the holder the right to purchase or sell foreign currency), and is a "transaction in foreign currency" because its subject matter is foreign currency.

> "The *more normal reading* of the key phrase encompasses all transactions in which foreign currency is the fungible good whose fluctuating market price provides the motive for trading. . . . There *can be no question* that the purchase or sale of a foreign currency option is a transaction 'respecting' foreign currency. We think it *equally plain* as a matter of *ordinary meaning* that such an option is a transaction 'in' foreign currency for purposes of the Treasury Amendment."

Id. (emphasis added)

Moreover, the Court pointed out that the CFTC's contention that options were not covered by the Treasury Amendment exemption "violates the ordinary meaning of the key word" of the Treasury Amendment (App. 18a); "would deprive the exemption of the principal effect Congress intended" (*id.*), and would render the statutory exemption to be "mere surplusage" and "without any significant effect at all" (*id.*, 20a); utilizes reasoning that was "wholly unpersuasive" (*id.*, 19a); suggests a reading that was "in clear contravention of Congress' intent" (*id.*); raises arguments that "are unsupported by statutory language" (*id.*, 22a); and that the correct result was "contrary to the CFTC's view" (*id.*).[5]

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[5] The Court also rejected the remaining contentions advanced by the CFTC in support of its desired interpretation of the Treasury Amendment, which included, *inter alia*, that: (1) CEA references to "transactions *in* foreign currency" allegedly did not include options, but those to "transactions *involving* foreign currency" did—due to the lack of any textual support, and since "[n]ot only do we think it unlikely that Congress would adopt such a subtle method of drawing important distinctions, there is little to suggest that it did so" (*id.*, 23a); (2) the so-called

Finally, the Court also noted that such a "plain meaning" result of including options within the Treasury Amendment exemption, was consistent with the express Congressional purpose indicated in its original enactment[6]—namely to

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"savings clause" proviso in the Treasury Amendment (i.e., "unless such transactions involve the sale thereof for future delivery conducted on a board of trade") supported its interpretation—noting that it actually contradicted the CFTC's claim, and that "[t]he use of the term 'involving' instead, within the very amendment that the CFTC claims embraces this distinction, weighs heavily against the view that any such distinction was intended by Congress" (*id.*, 24a, footnote omitted); (3) the CEA had an alleged practice of regulating options more strictly than futures—since "we give only slight credence to these general historical considerations, which are unsupported by statutory language, or any evidence evocative of the particular concerns focused on by the legislators who enacted the Treasury Amendment" (*id.*, 22a); (4) that the 1982 amendments to the CEA (which had added 7 U.S.C. § 6c(f), excluding from the CEA "any transaction in an option on foreign currency traded on a national securities exchange"), implied that it would have jurisdiction over foreign currency that was *not* traded on a national exchange—since the amendment "merely resolved a conflict between the Securities Exchange Commission and the CFTC concerning their respective authority to regulate transactions on an exchange," "made no change in the law applicable to off-exchange trading," and "shed[s] no light on the intent of the authors of the Treasury Amendment that had been adopted eight years earlier" (*id.*, 26a, citations omitted); and (5) its belated claim for administrative deference (*id.*, 26a, n.14)—not only questioning whether "the CFTC's position would be the one owed deference," since "the Treasury Department has taken a quite different view of the statute—one consonant with the interpretation set forth here," but, more significantly, since the statute clearly includes "options within the Treasury Amendment's exemption, administrative deference is improper." (*Id.*)

[6] Indeed, the baselessness of the CFTC's position was underscored by Justice Scalia, who filed a separate three-sentence opinion concurring in the judgment, stating "that 'the purposes underlying the Treasury Amendment are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it,' . . . which includes options to buy or sell foreign currency," and also stating that "the Court's extensive discussion of legislative history . . . [was not] "necessary to confirm the 'plain meaning of the language,' " and thus "join[ed] all except those portions of the opinion, which achieve nothing useful and sow confusion in the law." (*Id.*, 28a, citations omitted)

address the specific concerns of the Treasury Department that proposed expansion of the CFTC's jurisdiction would interfere with the off-exchange foreign currency market. In finding the clearly consistent Congressional purpose, the Court rejected the CFTC's illogical suggestion that since the foreign currency options market was not developed at the time of the enactment of the Treasury Amendment in 1974, options should not be included in the exemption. "Contrary to the Commission's suggestion, we therefore think the purposes underlying the Treasury Amendment are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it." (*Id.*, 22a)

Since the Court already has unanimously held that the CFTC was without jurisdiction over Petitioners (due to the "plain meaning" of the Treasury Amendment, and despite each of the CFTC's "unnatural" interpretations), the CFTC did not prove that its position was "substantially justified." The decision below improperly ignored the unanimous opinion of the Court (as well as all of its specific bases), and parochially relied solely on its own ten year old decision—the underlying rationale of which was wholly rejected by the Court. The decision below abused its discretion in concluding that the CFTC met its burden to prove that its position was "substantially justified"—particularly where not one Justice of the Court "was persuaded by any of [its] arguments," and the Court unanimously found its suggested reading of the Treasury Amendment to be "quite unnatural" and "in clear contravention of Congress' intent." *Id.*, 17a-19a.

B. The Judgment of the Court of Appeals Below Resolves An Important Federal Question in a Way that Conflicts With the Seventh Circuit and Its Own Precedent

In addition to conflicting with the Court's holdings in both *Dunn* and *Pierce*, the decision below also conflicts with that of the Seventh Circuit in *Marcus v. Shalala*, 17 F.3d 1033 (7th Cir. 1994), and fails to follow its own EAJA precedent.

In *Marcus*, the Seventh Circuit held, in light of a recent opinion of the Court, that the government's position was not substantially justified, despite several lower court decisions in its favor. Specifically, while the *Marcus* appeal was pending, the Court decided the issue against the government in an unrelated action, *Secretary of HHS v. Zebley*, 493 U.S. 521 (1989). In *Zebley*, the Court held (in a 7-2 decision), and in language similar to that utilized in *Dunn*, that: the "regulations cannot be reconciled with the statute they purport to implement" (493 U.S. at 528), "are simply inconsistent with the statutory standard" (*id.* at 536), and "nullify [the] congressional choice" (*id.* at 537); the government's position was "not persuasive" and was "unconvincing" (*id.* at 539), and its arguments made "little sense" (*id.* at 541); and "the Secretary's approach" was "manifestly contrary to the statute." (*Id.*)

Relying on the Court's decision—and even in light of conflicting authority—*Marcus* held the government's position was *not* "substantially justified," since the Supreme Court had "refute[d] the Secretary's contention that the questions involved were close ones." (17 F.3d at 1038) Thus, the ruling below—which ignored this Court's underlying decision and denied fees based solely on its one decision in the government's favor—conflicts with the Seventh Circuit's proper EAJA analysis incorporating this Court's ruling on the merits, and following the admonition in *Pierce* not to base its decision solely on a single ruling for the government. Such contradictory approaches to analyzing claims under EAJA significantly hamper their appropriate resolution, and encourage parochial and conflicting determinations.

Furthermore, in addition to conflicting with the Seventh Circuit, the decision below also conflicts with its own EAJA precedent, as the panel should not have looked any further than its controlling decision in *Political Contributions*, *supra*. Instead, the decision below erroneously provided the CFTC with a "second chance" to have a Second Circuit panel

attempt to effectively overrule the Court's holding—particularly when it already held in *Political Contributions* that such a finding "allows no further consideration of this issue." (995 F.2d at 396)

There, before the EAJA application, a prior panel had conducted an exhaustive analysis of the statutory language and legislative history, and had ruled that "the Commission had adopted an unreasonably restrictive interpretation of the provision in question and of its own corresponding regulation" (*id.* at 384), which "had defied the congressional intent behind the Act" (*id.* at 385). Thus, the court noted that the prior panel had "considered this case on the merits [and] found the government's position to have been unreasonable," which "allows no further consideration of this issue." (*Id.* at 386)[7] There, as here, "[n]either the terms of the statute, its legislative history, nor the evidence concerning the nature of the [activities] involved were unknown to the Commission when it decided to undertake this litigation," and "the previous panel [had] conclusively established that the Commission's position was not substantially justified so as to bar an award of attorney's fees." (*Id.* at 387)

Under *Political Contributions*, where "a previous panel"—or certainly, as here, the Court—"has specifically passed on every question," and "found the Commission's position to have been unreasonable in that it frustrated the intent of Congress," both the district court and the Second Circuit are "bound by the panel's conclusions." (*Id.*) The determination

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[7] The decision below erroneously attempted to avoid a conflict with its prior decision in *Political Contributions* by stating that there, the "only authority for the FEC's position was its own advisory opinion," but that here, the CFTC purportedly "reasonably relied on a controlling decision of this court to support its litigation position" and thus had "no difficulty in upholding the district court's determination that the Commission's position was 'substantially justified' " (App. 4a-5a)—although without acknowledging that the Court had unanimously rejected the entire rationale of that decision. *See* App. 18a.

here similarly should have been controlled by the Court's unanimous holding that the CFTC's interpretation was manifestly contrary to both the Treasury Amendment's plain language and the intent of Congress. Indeed, as the Second Circuit held in *Political Contributions*, it is "hard to imagine how it could be held that one had been 'substantially justified' in defying the will of Congress." (995 F.2d at 387)

"In granting summary judgment [or here—a unanimous reversal] to appellant, the previous panel [or here—this Court] found the Commission's position unreasonable in light of the plain language and legislative history of the statute." (*Id.* at 386) As there, the court below should have reversed the denial of EAJA fees "not because the government lost its claim, but because a previous panel of this court [or here, the Supreme Court] determined that the statutory language and the legislative history were clear."[8] (*Id.* at 387)

C. The CFTC Properly Should Be Liable Under EAJA For Its Contrived Jurisdictional Gambit

Driven by a desire to exert jurisdiction beyond its statutorily mandated limits, the CFTC simply proceeded without substantial justification—apparently seeking to obtain unwarranted authority through Petitioners' anticipated attrition. As provided in EAJA's legislative history, however, rather than "capitulate in the face of [such] meritless action" (131 Cong. Rec., *supra*, at 20,348), Petitioners defended themselves

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[8] Neither the CFTC nor the Second Circuit ever explained how it validly could be contended that something more than a unanimous decision of the Court before remand, as well as a prior decision of the Court (and governing precedent of the Second Circuit) should have been necessary below. Similarly, the CFTC failed to explain how it can claim to have relied on such Second Circuit precedent in the underlying action, but after its contentions are held to be "quite unnatural" by a unanimous Court, it then can claim that it is somehow (conveniently) *not* bound by such decision and the Second Circuit's precedent relating to an EAJA claim.

before the district court, the Second Circuit, and this Court—which unanimously rejected the CFTC's unjustified gambit.

In the underlying action, the CFTC consciously gambled that the Second Circuit would find itself bound by the ten-year old decision of a prior panel in *American Board of Trade*. However, the CFTC failed to analyze that reasoning (or the lack thereof) prior to bringing the underlying action—where its flawed conclusions should have been apparent. Indeed, the CFTC was fully aware that at the time this action was initiated, *American Board of Trade* was already 10 years old, and its reasoning had been seriously undermined by the Fourth Circuit in *Salomon Forex, supra*—which, unlike *American Board of Trade*, provided an extensive analysis of the language and meaning of the Treasury Amendment. (8 F.3d at 970-79) Nevertheless, the CFTC attempted to exploit *American Board of Trade* for its perceived tactical value (and continued to do so in reference to the subsequent EAJA application—where the Second Circuit then affirmed the district court's denial of Petitioners' application for EAJA fees, again *solely* based on the CFTC's alleged entitlement to "rely" on its rejected rationale in *American Board of Trade*). App. 4a-5a.

The CFTC's maneuver initially was successful—although the Second Circuit expressly noted that "[w]hatever doubts this panel may have about the interpretation" of *American Board of Trade* "are not grounds for our declining to follow it." (58 F.3d at 53) Moreover, its tactic ultimately would have been successful—if the Court had not granted review, and then expressly rejected all of its "unnatural" analyses. Particularly where the "reasoning" of *American Board of Trade* clearly represented a misreading of the plain meaning of the Treasury Amendment, and the CFTC exploited it for a "free ride" through the Second Circuit—both on the merits of the underlying action, as well as on the subsequent EAJA application—Petitioners properly should not be compelled to bear the cost of its unwarranted jurisdictional gambit.

Furthermore, this was not the CFTC's first attempt to reinterpret the Treasury Amendment and assert jurisdiction to suit its own purposes, despite the clear statutory language. The Fourth Circuit had recognized such attempts—noting that the CFTC was "pressing for greater regulation of transactions in foreign currencies." *Salomon Forex, supra*, 8 F.3d at 974. Similarly, in *Frankwell, supra*, the Ninth Circuit also rejected the CFTC's jurisdictional contentions, affirming the decision of the district court—which had rejected its "suggest[ed] interpretation of the Treasury Amendment" as inconsistent with the statutory language or legislative history, but "[n]ot surprisingly," it "would keep defendants within the reach of the Act." [1994-96 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,222 at 41,984 (N.D. Cal. 1994).

Such a jurisdictional gambit also was evidenced by the CFTC's venue shopping tactics in these proceedings (which the decision below now encourages). Having filed its subpoena enforcement action in the district of New Jersey in August of 1993, *CFTC v. Dunn*, D.N.J. Civ. Action No. 93-3740 (WGB), the CFTC elected, seven months later, to commence its injunctive action in the Southern District of New York.[9] In doing so, the CFTC apparently sought: (1) to avoid litigating this matter before that court—which had modified its overly broad subpoenas, and imposed certain appropriate restrictions on its use of materials obtained;[10] and/or (2) to exploit (initially successfully) the Second Circuit's ten-year

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[9] Under the CEA, venue was permissible either in the District of New Jersey (where Petitioners resided), or the Southern District of New York (where the banks were located which conducted the majority of the trading). 7 U.S.C. § 13a-1 provides that the CFTC may bring an action "in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur."

[10] That court did not rule on Petitioners' contention that the Treasury Amendment excluded CFTC jurisdiction over their activities. However, the CFTC was fully and formally aware of such a position, even prior to its initiation of this action.

old *American Board of Trade* ruling (rather than litigate in the Third Circuit, which had no Treasury Amendment decision).

Thus, after appeals to both the Second Circuit and the Court, Petitioners' original contention that the Treasury Amendment exempted their trading from CFTC jurisdiction was verified by a unanimous Court (which also unanimously rejected each of the CFTC's contrary contentions). In these circumstances, Petitioners are entitled to an award under EAJA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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